

would have to be deducted twice. In my judgment, this would seem inconsistent with the provisions of the Act. I am therefore of the view that the Commissioners had erred in law in arriving at the decision that the losses of the Singapore branch attributable to the business carried on in Singapore should be deducted from their income derived in Malaysia in the ascertainment of the appellant company's total income for the year of assessment 1968.

For this reason, I allow the appeal by the Revenue and would in so doing, state that in my judgment the losses in the Singapore branch cannot be deducted from the appellant company's income derived in Malaysia in the ascertainment of the appellants' total income for the year of assessment 1968.

I order that costs of this appeal be borne by the appellant company.

Order accordingly.

Solicitors: Skrine & Co.

KARTHIYAYANI & ANOR. v. LEE LEONG SIN & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo)
and Raja Azlan Shah F.J.) November 23, 1974]
[Ipoh — Federal Court Civil Appeal No. 3 of 1973]

Road Traffic — Negligence — Res ipsa loquitur — Finding of trial court — Whether can be upset an appeal — Vicarious liability.

Damages — Fatal accident — Expectation of normal working life.

Evidence Act, 1950, s. 157 — Corroboration — Observations on.

In this case the facts were that the first respondent had borrowed a car from his brother, the second respondent, to see a cinema show with his friend, the deceased. There was an accident on the way back from the cinema and the friend was killed. The appellants, the administrators of the estate of the deceased, brought an action for damages against the respondents. At the trial the first respondent gave evidence and denied negligence. The learned trial judge accepted the evidence of the first respondent as he held that his evidence was corroborated by the report and the previous statement made by him at the Coroner's inquest. The learned trial judge also dismissed the action against the second respondent as he held that the appellants had not pleaded the cause of action against him. The appellants appealed.

Held: (1) the learned trial judge had misdirected himself on the question of corroboration as neither the previous statement of the first respondent nor his statement to the police (which was not a first information report) could be used to corroborate his evidence effectively;

(2) the learned trial judge had also wrongly made findings of fact as to the speed of the car and its going on the grass verge which was not supported by the evidence;

(3) as the first respondent had not adduced reasonable explanation of the accident, which on the doctrine of *res ipsa loquitur* was consistent with negligence on his part, judgment must be given against him;

(4) the second respondent was not responsible for the negligence of the first respondent as there was no evidence to show that at the material time the first respondent was the second respondent's servant or was acting on second respondent's behalf as his agent.

Cases referred to:-

- (1) *Colvilles Ltd. v. Devine* [1969] 2 All E.R. 53, 57.
- (2) *Powell v. Strathan Manner Nursing Home* [1935] A.C. 243, 245, 247.
- (3) *Watt or Thomas v. Thomas* [1947] A.C. 484, 487, 488.
- (4) *Ormrod v. Crosville Motor Services Ltd.* [1953] 2 All E.R. 753, 754.
- (5) *Hewitt v. Bonvin* [1940] 1 K.B. 188, 191, 194.
- (6) *Rambarram v. Gurrucharran* [1970] 1 All E.R. 749.
- (7) *Norton v. Canadian Pacific Steamships Ltd.* [1961] 2 All E.R. 785.
- (8) *Vandyke v. Fender* [1970] 2 All E.R. 339, 342.
- (9) *Morgans v. Launchbury* [1972] 2 All E.R. 606, 613, 614.
- (10) *Hilton v. Thomas Burton (Rhodes) Ltd.* [1961] 1 All E.R. 74, 76.
- (11) *Klein v. Caluori* [1971] 2 All E.R. 701, 702.

FEDERAL COURT.

N. T. Rajah for the appellants.

B. K. Tan for the respondents.

Raja Azlan Shah F.J.: This appeal arises out of a motor car accident in which respondent No. 1 was injured and the only passenger was killed. Respondent No. 1 was driving the motor car. He had borrowed it from his brother, respondent No. 2, in order to see a cinema show together with his friend, the deceased, at Seremban. The appellants who are the administrators of the estate of the deceased passenger brought an action for damages in respect of his death against the respondents.

The following facts are not in dispute. After the show they were returning to Tanjong Sepat, Selangor. It was about 11 p.m. on 20 November 1966. They took the Sepang/Tanjong Sepat straight stretch of open road, which was 14' 6" wide. There were no street lights; it was drizzling. Some distance before they reached Tanjong Sepat the car ended up diagonally against the cement culvert on the opposite side of the road with the substantial part of the vehicle on the road. The car was a total wreck. The deceased died on the spot. Respondent No. 1 was severely injured. He was unconscious and regained consciousness at Klang Hospital. He lodged a police report 4 days later.

The appellants pleaded *res ipsa loquitur*. The respondents denied negligence. They averred that the accident was caused or contributed to by the negligence of the driver of an oncoming lorry which encroached into their path with the headlights blinding the driver (respondent 1) and therefore the accident could not have been avoided by the exercise of reasonable care on their part.

In the light of the pleadings it fell upon the respondents to give a reasonable explanation of the accident and show this explanation was consistent with no lack of care on their part. See *Colvilles Ltd. v. Devine*.⁽¹⁾ They only called the driver, respondent 1, and the owner of the car, respondent 2. The investigating officer who went to the scene the same night and drew the sketch plan was not called as witness.

The case for the respondents was to the effect that as the two vehicles were about to pass each other, respondent 1's eyes were blinded by the headlights of the oncoming lorry which was encroaching on his

wrong side of the road with the result that respondent 1 had to swerve his car onto the left grass verge in order to avoid a head-on collision. Oral evidence was also adduced that respondent 1 drove the car for some distance on the grass verge and when he saw his car was heading towards the left cement culvert 10 feet away he swerved it to the right where it finally landed against the cement culvert on the opposite side of the road. Respondent 1 could not avoid the accident by applying his brakes because, as stated by him, if the car was brought to a standstill on the road there would have been a head-on collision with the oncoming lorry.

The evidence thus led found favour with the learned trial judge who felt inclined to believe that the evidence was consistent with the statement respondent 1 made at the inquest that he "swerved to the right in order to avoid a culvert on the grass on my left". The learned judge went on to say that even if it were true that he had not swerved to the left, he was of the opinion that he would still be excused for crashing into the culvert on the right as it was an accident caused by the encroachment of the lorry and its dazzling lights.

He relied on the police report as corroboration of the encroachment.

He also held that respondent 1 was driving the car between 30 to 40 miles per hour. Here are his words:

"It was submitted that since the car was a 'total wreck' after the accident, this shows exceedingly high speed of the car. Although there is evidence to the effect that the car was extensively damaged and could not be used after the accident, there is no evidence of how old the car was. An old car may be extensively damaged when involved in collision even if driven at a moderate speed. I accept the first defendant's evidence that he was driving between 30 to 40 miles per hour."

He therefore dismissed the case against respondent 1. As regards the case against respondent 2, he also dismissed it on the ground that the appellants had not pleaded the cause of action against him.

The appellants now appeal against that decision.

Case against respondent 1:

The crux of the matter is whether the respondents have given a reasonable explanation consistent with no negligence on their part. They raised three issues viz., (1) there was an oncoming lorry with dazzling lights encroaching respondent 1's path; (2) respondent 1 had to swerve his car to the left in order to avoid a head-on collision and then to the right, and (3) he was driving at a reasonable speed of 30-40 miles per hour.

The learned judge accepted the story of the respondents. He fortified his finding by resorting to the previous statement made by respondent 1 at the inquest on 26th December 1968, which he said is consistent with the testimony respondent 1 gave in court. The learned judge did not say it in express words what provisions of the Evidence Act he had in mind. Reading in its context I have no doubt he was referring to section 157 of the Evidence Act which enables a court to have regard to any former statement made by a witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, in order to corroborate the testimony of such a witness.

A In my judgment the finding of the learned judge shows that certain salient features of this aspect of the evidence were missed or were not properly appreciated. It is settled law that a person cannot corroborate himself but it would appear that section 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under section 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, i.e., if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.

F The nature and extent of corroborative evidence is a factor which should have been weighed by the learned judge. But as far as I can see, he did not mention it.

G It was submitted to us on behalf of the appellants that if it was true that there was an oncoming lorry with dazzling lights encroaching the respondent's path thus making him swerve his car to the left grass verge and travel on it for some distance, then as it was drizzling that night, such manoeuvre would have left tyre marks on the grass verge. But the sketch plan does not show that. On this aspect of the case the learned judge observed thus:

H "I do not think it can be positively said that there were no tyre marks on the left grass verge merely because they do not appear on the sketch plan. If the investigation officer who drew the sketch plan visited the scene in the middle of the night and did not use proper light on every part of the area of the accident the chances were that he might have not seen tyre marks that might be present there. It is possible that the investigation officer might not have directed his attention to the left grass verge in view of the fact that the car was found on the right hand side of the road. Evidence shows that the first defendant was injured and unconscious after the accident, and therefore he would not be present to assist the investigation officer in investigation which might be carried out at the scene that night."

I In my opinion this conclusion demonstrates that the learned judge fell into error in relation to such matters. If that is so then it would not be just for an

appellate court to regard itself as compelled to regard as conclusive his finding on the issue of fact. The investigating officer was never called as a witness by the respondents. In the absence of clear and convincing evidence the beliefs and assumptions of the trial judge cannot be validly imported into his finding of fact. He cannot be both judge and witness. In cases where the oral evidence of a witness may be tested by some objective fact of a highly persuasive nature, it is within the competence of a modern appellate court to over-ride the trial court on questions of pure fact, even though this has been decided on the basis of credibility. In my opinion this is a case where a material document, *i.e.*, the sketch plan, so flatly contradicts a passage of oral testimony that doubt may be entertained about the weight attributed at the trial court for that piece of evidence.

The learned judge held further that the encroachment by the oncoming lorry is corroborated by the police report. Here again the learned judge was wrong in his approach on the matter. In the familiar case where a police report is admitted under the law, it is necessary that it should have been made before police investigation has commenced. The reason for this is that this class of statement is admitted upon the principle that it is the natural effusion of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. The main test as to whether there has been a delay in making the report is whether it was made as early as can reasonably be expected in the circumstances of the case and before there is opportunity for tutoring or concoction. This, in my opinion, is also a circumstance tending to affect a witness's impartiality, hence his veracity which must be taken into account in arriving at a decision.

The learned judge should have borne in mind that the police report was not made at or about the time of the accident; it was made some four days later, *i.e.*, after police investigation has commenced. It is therefore not a first information report and consequently its effect as corroborative evidence must be tested by reference to the probabilities of the case. I feel there was a misdirection by the learned judge.

The learned judge also held that respondent 1 was driving at a reasonable speed of 30-40 miles per hour. There is not a scintilla of evidence to show the age of the car but he made a finding on the assumption that an old car may be extensively damaged in collision even if driven at a moderate speed. The possibility that the car is old is entirely speculative and unproven to the point of improbability.

It was submitted to us in the course of the argument that the findings of the learned judge are findings of fact and therefore this court should not reverse them. See *Powell v. Stratham Manor Nursing Home*.⁽²⁾ In my opinion, the proper course to be adopted in the present case is to have regard to the well-known observations enunciated by Lord Thankerton in *Watt or Thomas v. Thomas*:⁽³⁾

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do

so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court...."

And then Lord Thankerton added words of particular pertinence in the present case —

"... It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...."

In my judgment, on the question of corroboration, there has unfortunately indeed been a misdirection in the present case. On the question of speed, there is simply no evidence to support the finding that respondent 1 drove the car at a reasonable speed of 30-40 miles per hour. This mistaken view as to corroboration and speed and the importance the learned trial judge demonstrably attributed to them must, in my opinion, have coloured his final approach to the issue of fact so gravely that the present judgment ought not to be allowed to stand.

In the result the respondents have not adduced reasonable explanation of the accident which is consistent with negligence on their part.

E Case against respondent 2:

The only question to ask is whether the relationship between the respondents is such as to lead to vicarious liability. Although the statement of claim did not plead that at the material time respondent 1 drove the car as respondent 2's servant or agent, the amended statement of defence did allege that respondent 1 was not driving respondent 2's car as his servant or agent. Therefore that issue was brought before the court on which evidence was led by both parties. In my opinion the learned judge was wrong in dismissing the appellant's case on the basis that no cause of action was shown to exist against respondent No. 2.

The case for the respondent was this: (1) At the material time respondent 1 was not driving the car as his servant and (2) that he had no interest in the object of the particular journey undertaken by respondent 1 and the deceased.

The appellants put their case on the fact of ownership. They averred that the law put an especial responsibility on the owner of the vehicle who allowed it to go on the road in charge of someone else.

Although there is some force in saying that the fact of ownership is a valuable consideration in determining whether or not the driver is driving independently or for and on behalf of the owner, it would be surprising that that fact alone could saddle the owner with liability. It has never been the law that the owner of a car is responsible in law for damage done by the negligence of a person to whom the car is lent or whom he has permitted to use it. Singleton L.J. said this in *Ormrod v. Crosville Motor Services Ltd.*⁽⁴⁾ (at page 754):

"It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of

consent by the owner to the use of the chattel is not proof of agency. . . ."

Any other view would be tantamount to say that *Hewitt v. Bonvin*⁽⁵⁾ was wrongly decided. And that case was approved by the Privy Council in *Rambarran v. Gurucharran*.⁽⁶⁾ In my view the legal principle was correctly stated by MacKinnon L.J. in *Hewitt v. Bonvin* (page 191):

"If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorised the act. If he can establish that B was the servant of C the question of authority need not arise."

Du Parcq L.J. in that case put the matter in the following way (page 194):

"The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership but on the delegation of a task or duty. . . ."

The reasoning in *Ormrod's* case is based on the same principle. Pearson L.J. in *Norton v. Canadian Pacific Steamships Ltd.*⁽⁷⁾ said (page 790):

"The owner of a car when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whether by the owner himself or by an agent to whom he has delegated the driving, the owner is liable."

Sachs L.J. in *Vandyke v. Fender*⁽⁸⁾ said of *Ormrod's* case:

"Ever since the decision of this court in *Ormrod v. Crosville Motor Services Ltd.* (*supra*) it has been considered clear that where the owner of the car has authorised a driver to drive a car, and has an interest in one of the objects of the particular journey, the driver is his agent when driving."

From the above authorities it can be said without fear of contradiction that the legal principle of vicarious liability for the negligent driving of a car by another person is the principle *qui facit per alium, facit per se*. I cannot put the matter better or more tersely than as I found it put by Lord Pearson in his speech in *Morgans v. Launchbury*:⁽⁹⁾

"If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuance of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent. Also the fact that the journey is undertaken partly for the purposes of the agent as well as for the purposes of the owner does not negative the creation of the agency relationship. *Hewitt v. Bonvin*, *Ormrod v. Crosville Motor Services Ltd.*, *Hilton v. Thomas Burton (Rhodes) Ltd.*,⁽¹⁰⁾ *Norton v. Canadian Pacific Steamships Ltd.* and *Klein v. Caluori*.⁽¹¹⁾ I think there has to be an acceptance by the agent of a mandate from the principal though neither the acceptance nor the mandate has to be formally expressed or legally binding."

It can therefore be seen that the test of vicarious liability in such cases as the present is not the "interest and concern" argument. The principle that the owner of a car is vicariously liable for the user of it by someone whom he has permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said

- A to have an interest or concern in the car being carefully used and in most cases to have an interest or concern in the safety of the driver but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits another to use his car does not become the former's agent if on his own volition he uses it for the owner's benefit, e.g., a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod's* case or where the owner asks his brother to bring the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his agent. The owner is liable because he has authorised or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used. The phrase *qui facit per alium, facit per se* correctly expresses the principle governing vicarious liability.

In the present case there is not an *iota* of evidence to suggest that at the material time respondent 1 was respondent 2's servant or he was acting on respondent 2's behalf as his agent. I agree with the decision of the learned trial judge but on a different ground.

E Damages:

The deceased left behind him his widow, 23 years old and a son 2½ years old. The learned judge accepted the following facts:

"... The deceased was employed and received a salary of \$425/- p.m. The loss to the family was \$200/- per month. Deceased was 30 years old at the time of his death."

- F There are insurance monies and E.P.F. monies belonging to the estate but these monies are not to be taken into account in awarding damages under the Civil Law Act. But the bank saving of \$1,000/- is to be considered since it is savings. The widow is comparatively young and the possibility of remarriage cannot be excluded. Both she and her son are now living with her father. She is not working.

- G Having regard to the age of the deceased, the age of the widow and of the son and taking into account the usual factors that must be considered in this type of case including the normal expectation of a normal working life of a man of 30 years, the hazards and vicissitudes of life itself and of employment and the payment of a lumpsum compensation, I make an award based on \$200/- per month spread over 18 years, i.e., \$43,200. Of this amount the bank saving of \$1,000 must be deducted thus leaving a sum of \$42,200.

- H Therefore the appeal against respondent 1 is allowed with costs here and below. The appeal against respondent 2 is dismissed with costs. Deposit to respondent 2 against taxed costs.

- I Suffian L.P. and Lee Hun Hoe C.J. (Borneo) concurred.

Appeal against 1st respondent allowed.

Appeal against 2nd respondent dismissed.

Solicitors: Maxwell, Kenion, Cowdy & Jones; Sothi & Ang.